84-1404

Office - Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

DONALD R. HUENE and ANNETTE S. HUENE,
Petitioners,

vs.

UNITED STATES OF AMERICA and MARSHALL P. JENNINGS,
Revenue Agent,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Did the Court of Appeals err when it rejected taxpayers' contentions to the effect that (1) they have a right to elect a "reasonable means" to make a record of a Title 28, § 7602 compelled examination and (2) under a published IRS regulation granting taxpayers a right to make "tape, stenographic or other verbatim recordings" of the audit, the use of a video recorder constitutes such "reasonable means"?

Did the Court of Appeals err in sustaining the Service's refusal to permit such video recording, both given the total absence of the necessary showing under the IRS regulation that "taxpayers' or their representatives' behavior" be "clearly disruptive of the normal examination process or investigative proceeding" and given the regulation's mandate, contrary to the Service's contention, that the recording method elected by taxpayers take place "in a suitable location, ordinarily in Internal Revenue Service Offices"?

Did the Court of Appeals err in sustaining the Service's refusal to permit videotape recording of the audit (1) given the fact that at the time of the service of summons and at the time set for the civil examination itself taxpayers were, and were aware that they were, the subjects of an IRS *criminal* investigation; and (2) given the fact that the civil summons power itself, under this Court's recent rulings, justifies compelling a taxpayer to manifest nontestimonial physical evidence?

Did the Court of Appeals err when in its published opinion it referred to and relied on the existence of facts as to which there is no evidence whatever, namely, when instead of pointing to a finding regarding taxpayers' or their representatives' behavior, it referred to what the service and the district court "could" conclude, when it referred to and relied on some supposed "desire" of taxpayers to videotape each "document", and when it indicated that "other means" of recordation were "offered" to taxpayers, none of which are facts of record?

Did the Court of Appeals err when, in addressing the question whether taxpayers have a right to videotape the audit, the court instead turned to the question of the adequacy and availability of

"other means" of recordation, declared that the availability and asserted adequacy of such "other means" were not unfair, and, based upon the lack of such unfairness, pronounced that therefore taxpayers have no right to videotape the audit?

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OPINIONS BELOW

The October 23, 1984 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 745 F.2d 1216, 84-2 U.S.T.C. 85,680 [¶ 9882] (9th Cir. 1984) and is reprinted in the Appendix to this Petition, pp. A-1 to A-3. The prior Memorandum Decision and Order of the United States District Court for the Eastern District of California is unreported but is also reprinted in the Appendix to this Petition, pp. A-4 to A-10.

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment of the Court of Appeals was entered on October 23, 1984. On February 22, 1985, the Honorable William C. Canby, Jr., Circuit Judge for the United States Court of Appeals for the Ninth Circuit, entered an order denying a stay of

mandate, pending the filing of this Petition. Application for an order staying the mandate has been made to the Honorable William H. Rehnquist. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States; Section 7602, Title 26, United States Code; and I Audit, CCH Internal Revenue Manual, Chapter 4245. The texts of these provisions are reprinted in full in the Appendix to this Petition, pp. A-12 to A-15.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the District Court was Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954 (26 U.S.C.).

On November 5, 1982, pursuant to Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.), the Internal Revenue Service ("Service") issued a civil summons to petitioners Donald R. Huene and Annette S. Huene ("taxpayers") requiring them to "appear" and to "give testimony" and produce "other data" on November 23, 1982 before Marshall Jennings, a Revenue Agent. R.6.

Prior to the service of this civil summons, taxpayers were informed that a criminal investigation was in progress concerning their tax liability and for determining whether they had committed any criminal violations with respect to the 1980 tax year, the same year that was the subject of the civil summons that gives rise to the present case. R. 45, 46-47, 51-52. Also prior to the issuance of the summons, taxpayers, aware that they would be audited pursuant to Section 7602, informed the Service of their intention to make a verbatim videotape record of the civil examination proceeding. The district director of the Service, construing this as a "request" by taxpayers, denied the request because in the opinion of the Service the "substantial amounts of

special equipment" would be disruptive of the audit procedure. The Service cited no authority for its refusal.

On November 23, 1982, taxpayers appeared with their records at the place designated in the summons. The summons did not forbid, nor did it make mention of any prohibition against, videotaping of the audit. Taxpayers responded to the summons, but in a manner consistent with their interests and within what they felt were the bounds of law and reason. Fearing that the summons power was being used to further a criminal investigation, they felt that either the summons power had been exceeded or, at least, that the precaution of videotaping the audit was and would continue to be justifiable and reasonable under the law. Taxpayers, therefore, were accompanied by an attorney and a person carrying video recording equipment. Agent Jennings refused to proceed with the examination proceeding. R. 6-7.

Construing the Service's refusal to proceed with the audit as a refusal of taxpayers to comply with the summons, the Service filed with the district court, pursuant to 28 U.S.C. § 7604(a), a petition to enforce Internal Revenue Service summons.

At the hearing on the petition, Judge Edward Dean Price, Judge of the United States District Court for the Eastern District of California, quoted from documents that had been recently filed by the Service in a separate district court civil action involving taxpayers and the Service. That document, filed both after the date of service of the administrative summons in this case and after the date set for the civil audit in this case, indicated that taxpayers "are presently under investigation by the Internal Revenue Service for the purpose of determining their . . . correct federal tax liability and determining whether plaintiff and his wife have committed any criminal violations of the Internal Revenue laws." R.45.

Also during the hearing on the petition to enforce, IRS Agent Jennings indicated that prior to issuing the summons he had been advised of the "withdrawal of a criminal investigation." R.53-54. However, at no time prior to the date for the investigation and at no time prior to the hearing on the petition to enforce the summons—indeed, at no time thereafter—have taxpayers ever

formally been informed of such withdrawal. R.53-54. District Judge Price has deferred ruling on whether there has been a withdrawal. R.77.

On August 19, 1983, the district court entered its memorandum decision and order (R. 72-79), holding (1) that the Service was correct in its refusal to allow taxpayers to videotape the audit and (2) that the holding in *Mott v. McMahan*, 214 F.Supp. 20 (N.D.Cal. 1963), "would be controlling in the present case" but for the absence in the present case of what the court deemed to be "serious and important safeguards necessary to ensure the integrity of the reporting process" R.76. Such safeguards, the district court indicated, would exist only if the video recording were done by a "certified" operator.

The district court thereupon ordered enforcement of the summons, ruling that there was no right in the taxpayers to be accompanied by anyone making a videotape recording of the proceedings and allowing taxpayers, at the examination, to be accompanied only by a certified shorthand reporter who would be permitted, at taxpayers' expense, to make a stenographic transcription of the proceedings. The District Court granted a conditional stay pending appeal to the United States Court of Appeals for the Ninth Circuit.

Taxpayers attacked the holding that they have no right to make a videotape record of the examination proceedings.

The Court of Appeals, in a *per curiam* opinion, purported to affirm the district court, insofar as the question whether taxpayers have a right to make a videotape record of the proceeding is concerned. However, rather than address the question presented, and on which the appeal was founded—i.e., whether taxpayers have a right to videotape the audit proceedings—the court of appeals analyzed what it deemed to be "the circumstances of this case", noted that some "other means" of recording the audit were (as it said) "offered" to taxpayers which (as it said) were "fully adequate to memorialize the proceedings," and concluded that there was "no basic unfairness to taxpayers" and that thus their rights were not violated. It is both this ruling of the court of appeals and the unjustifiable departure from the accepted and

usual course of judicial proceedings that its handling of the issue represents, that taxpayers seek review of by way of certiorari in this Court. As to the other issue implicated by the district court's order (relating to the allowance of only a certified shorthand reporter), which issue taxpayers did *not* raise on appeal, the court of appeals modified the condition imposed by the district court relating to the requirement that the stenographer allowed be "certified". The court of appeals thus modified in this one respect and "affirmed", as it said, "in all other respects", the order of the district court.

REASONS FOR GRANTING THE WRIT

At the outset, prior to presenting their reasoning why the Court should review what taxpayers contend is an erroneous and unjust decision and the improper means by which the court of appeals arrived at its decision, taxpayers frankly point out what the weaknesses are in their case. First of all, Chapter 4245 of the Service's Internal Revenue Manual states that

> [r]equests by taxpayers or their representatives to make tape, stenographic, or other verbatim recordings of examination proceedings will ordinarily be allowed, except where the taxpayer's or representative's behavior is clearly disruptive of the normal examination process or investigative proceeding.

The Manual provision thus does *not* expressly provide for or mention *videotape* recording, nor does it in any way expressly indicate that the phrase "other verbatim recordings" includes videotape recording.

Secondly, taxpayers did not seek a protective order prior to the time the Service filed its petition to enforce summons in the district court. Consequently, the issue raised before the district court and appealed to the court of appeals, as to which certiorari, in part, is sought in this court, was litigated in the context of opposing a petition to enforce summons rather than in an action by taxpayers against the Service.

Lastly, the Service cited to the Ninth Circuit numerous cases in which various First, Fifth, and Sixth Amendment arguments

had been properly rejected by Courts of Appeals and by the Supreme Court, and taxpayers, in their zeal to point out the inapplicability of those rejected arguments, are made to appear as if, or apparently gave the court of appeals the erroneous impression that, they had waived all their Constitutional arguments.

Taxpayers do concede that, as far as the Constitution is concerned, their right to videotape the audit is not, *per se*, rooted in the Constitution; however, they do not concede, and have not at any time conceded or abandoned their argument, that the Service's denial of that right, rooted as it is in the applicable case law and IRS regulations, should not have been denied by the Service in violation of its own published manual provision governing such denial.

By way of introduction to taxpayers' contentions as to why a writ of certiorari should be granted, therefore, taxpayers respectfully submit that the present case does not demonstrate solely that the court of appeals committed "mere error." Error it did commit, taxpayers contend. (See parts I and II below.) But more importantly, though that error (on the question presented) constitutes mere legal error, the *manner* in which the court of appeals circumvented the question presented and rendered its own decision ought not be to countenanced by this Court. (See parts III and IV below.) Not only has an injustice been done to these petitioning taxpayers, but a disservice has been done to taxpayers generally who must rely on the Service's regulations governing their rights in compelled civil examinations. The rule of law which the court of appeals promulgates is, taxpayers believe, dangerous not only to all taxpayers but, indeed, to the Service itself.

Because the court of appeals' opinion purports to rest on an evaluation of "the circumstances of this case," its ruling, at first blush, would give this Court the impression that the decision is "factbound"—i.e., so rooted in a unique fact pattern as to be useless in future contexts. Taxpayers oppose such judicial legerdemain as has led to the Ninth Circuit's published opinion and taxpayers herein set forth, as best they can, their reasons why this Court should reject both the court of appeals' decision and

opinion (parts I and II) and the method by which the court of appeals created its ruling (parts III and IV). Although the first two arguments discuss the merits of the case and the last two parts the reasons why certiorari should be granted, the latter cannot, taxpayers believe, be well understood without a foundation in the former.

I

Taxpayers have a right to elect reasonable means to make a record of a compelled Section 7602 examination and, under the IRS regulation which permits taxpayers to make "tape, stenographic or other verbatim recordings" of such examination proceedings, the use of a video recorder constitutes such reasonable means

Annually, in the United States, the Service examines over 1.6 million tax returns. Of these, revenue agents examine over one-half million returns at taxpayer's places of business and tax auditors examine over one million returns in IRS offices. *See generally*, Internal Revenue Service, 1983 Annual Report of Commissioner and Chief Counsel, Internal Revenue Service, at 7, 11.

The question whether taxpayers have a right to videotape a Section 7602 audit has not been, but should be, answered by this Court. Because of the nationwide application of IRS laws governing audit procedures and because of the expansive scope given to the Service's civil summons power—including as it now does under recent Supreme Court doctrine the power to compel the manifestation of various forms of nontestimonial physical evidence—there exists a need to avoid lack of uniformity in the law and vagueness in the standard to be applied in resolving the question in future cases.

The controlling principles of law on the question whether taxpayers may make a verbatim videotape recording of the Service's compelled examination are simply this:

First, under *Mott v. McMahan*, 214 F.Supp. 20 (N.D.Cal. 1963), taxpayers are held to have a right to have their personal

court reporter present. In so holding, the court rules in an opinion long since acquiesced in by the Service, as follows:

> There is nothing in the entire statutory scheme to suggest that it was the intention of Congress in giving the very broad powers to the Secretary or his delegate, that they should be exercised arbitrarily or unreasonably or without proper regard for reasonable means elected by taxpayers or witnesses to take notes of proceedings such as the proceeding here involved.

214 F.Supp. at 22. Holding thus, in its 1963 opinion, that the use of a stenographic reporter constitutes such "reasonable means", the court justifies its holding, stating that "[t]he hearing contemplated by Section 7602 is *not* one attended by the safeguards inherent in court proceedings to insure fairness and impartiality protecting all parties to a controversy." (*Id.*, emphasis added). *Mott*, therefore, rejects, in essence, the rationale upon which rested an earlier contrary ruling in the case of *Torras v. Stradley*, 103 F.Supp. 737 (N.D. Ga. 1953), in which another court had declared that a witness summoned to testify could neither insist upon having his own stenographer present nor "raise any inference of unfairness as a basis for such a demand." 103 F.Supp. 740.

There is, said the earlier court, "a presumption in favor of regularity of official actions." Not so, says *Mott*. Fairness and impartiality are *not* inherently safeguarded against in a Section 7602 examination. Of course, the *Mott* case, standing alone, establishes neither a right to make an audiotape record nor a right to make a videotape record of the examination proceeding.

Second, as an acquiescence in, and expansion on *Mott*, the Service has adopted Chapter 4245 which declares that taxpayers may make "tape, stenographic or other verbatim recordings of examination proceedings." The making of such recordings, states the Manual, "will ordinarily be allowed except where the taxpayer's or representative's behavior is clearly disruptive of the normal examination process or investigative proceeding."

The question whether taxpayers have a right to videotape the § 7602 audit is a question that should be answered by this Court

because of the extent to which the Service's civil summons power extends, as acknowledged by this Court's recent, correct rulings.

This Court has recently held, in *United States v. Euge*, 444 U.S. 707, 63 L.Ed.2d 11, 100 S.Ct. 874 (1980), that Congress has empowered the Service to compel certain forms of nontestimonial physical evidence. In *Euge* this court cites IRS's "power to compel a witness to 'appear', to produce 'other data', and 'give testimony'..." (444 U.S. 711), and draws in large measure from "the common law evidentiary duty" (444 U.S. 713), which permits the compulsion of various forms of physical evidence" (*Id.*), including "fingerprinting, photographing, or measurements to write or speak for identification, to appear in court, to stand, to assume a stance, to walk or to make a particular gesture." *Id.* Referring thus to "an obligation to provide certain forms of nontestimonial physical evidence" (Id.) including a witness's obligation to manifest "corporal facts existing on his *body*" (*Id.* at n. 7, emphasis in original), this Court announces its belief that the language of § 7602 suggests an intention to codify a broad testimonial obligation, including an obligation to provide some physical evidence relative and material to a tax investigation" (*Id.* 714), a conclusion, says this Court, "inherent in the imposition of an obligation to 'appear,' since an obligation to appear necessarily entails an obligation to display physical features to the summoning authority." *Id.* at 714.

At the time of the attempted examination herein and at all times thereafter, it has been and continues to be, even to the present time of the filing of the petition for certiorari before this Court, unclear to taxpayers what the intended scope of the examination by the Service is. The pendency of a criminal investigation is, of course, of no small concern. The district court judge's deferral of the fact finding on this issue leaves the matter unclear.

Given the scope of the civil summons power, as this Court has construed it, the use of videotape as a medium of preserving a record of a Section 7602 audit is not at all inconsistent either with modern technologies or with the decorum of official proceedings. Of course as to certain *other* types of proceedings (i.e.,

criminal trials), lawmakers through statute, rule, or regulation have forbidden such means at least for the purposes of *broadcasting*. However, no such prohibition exists here. By simple way of analogy, for example, videotape as a medium of preserving *evidence* (rather than of making a record) and later as a medium of presenting such evidence is not at all necessarily inconsistent with the conduct of certain proceedings of a purely administrative nature. Both when made and when, if ever, reviewed, videotapes simply constitute a reasonable, and in certain ways superior, medium for recording data. *See generally, Cinevision Corporation v. City of Burbank*, 745 F.2d 560, 578 n. 25 (9th Cir. 1984). But what is to be said of using videorecording to make an accurate *record* of an administrative examination to which taxpayers have been compelled to "appear" and as to which the applicable lawmaker, rather than forbid videorecording, has allowed taxpayers to make "tape, stenographic or other verbatim recordings"?

Videotaping itself is becoming more and more prevalent, recognized, and valuable as a means of preserving a record of evidence gathered during various forms of examinations. *See generally*, C. Monteleone, Videotape Depositions, 68 A.B.A.J. 863 (1982); M. Dombroff, Videotape Depositions: Their Effective Use in Litigation, 11 Barrister 45 (Winter, 1984); C. Kabler, The Videotaped Deposition, 16 Trial 40 (March 1980); W. Bower, Video Technology Invades Law Practice, 20 Trial 28 (February 1984); 8 Justice System Journal 287 (Winter 1983). Indeed, if analogy is to be drawn from other contexts (as the Ninth Circuit's opinion suggests by its reference to a criminal trial case), then helpful analogy might be drawn from Canon 3(A)(7)(a) of the Code of Judicial Conduct, which provides, in relevant part, as follows:

> (7) A Judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

> (a) The use of electronic or photographic means for the presentation of evidence, or for the perpetuation of a record; . . .

Given the fact that a § 7602 examination must be viewed from the beginning premise that it is *not* one attended by the safeguards inherent in court proceedings to insure fairness and impartiality protecting all parties to a controversy, it can only be concluded given the scope of the civil summons power as recognized by this Court, that "fairness" is more consistent with recognizing the right to videotape than with denying it.

The rule of law promulgated by the *per curiam* opinion of the Ninth Circuit in the present case states, in essence, that the question in this case is "whether it violates any right of taxpayers for the Service not to permit" use of a video recorder to record the examination proceedings. The Court of Appeals concludes "that in the circumstances of this case it does not." As will be discussed in parts III and IV, below, taxpayers contend not only that this conclusion depends on the existence of facts as to which there is no evidence whatever but that it is arrived at through a departure from the accepted and usual course of judicial proceedings. In short, as will be pointed out below, the opinion of the Ninth Circuit Court of Appeals lays down a rule of law that depends solely on what the Circuit Judges of an appellate court deem to be "fair." Such a standard can only breed a lack of uniformity in the law and vagueness in the standard to be applied in resolving the issue in future cases. The purpose of this part I of the petition for certiorari, however, is to point out only that the court of appeals has erred on an important question of federal law that affects all taxpayers summoned to appear before the Service. In later portions of this petition it will be argued that the very manner in which the court of appeals decided the question whether taxpayers have a right to videotape the examination is in conflict with applicable decisions of the Supreme Court. Taxpayers will argue that the court of appeals departs from the rules governing judicial construction of government regulations not only by failing to construe and apply the provisions of Chapter 4245, but by failing even to discuss what those provisions are. Taxpayers will further contend that no less is it a requirement for

the Court of Appeals than for the Service to cause that a standard that affects substantial individual rights and obligations be generally known so as to assure that it be applied consistently and so as to avoid both the reality and the appearance of arbitrary denials of the right. *See generally, Morton v. Ruiz*, 415 U.S. 199, 231-32, 94 S.Ct. 1055, 1072-73, 39 L.Ed.2d 270, 291-92 (1974).

As to the correctness of the circuit court's opinion, however, it can be said, at best, that the court of appeals *did* interpret one aspect of the Service's own regulation, and this the court did of its own accord. But the court interpreted this aspect of the regulation in such a way as to *strengthen* taxpayer's position and render it all the more plausible.

Chapter 4245 "ordinarily" allows taxpayers to make "tape, stenographic, or *other verbatim recordings of examination proceedings*" (emphasis supplied). Taxpayers contend that videotaping constitutes such "other verbatim recordings" as allowed by that provision. The Court of Appeals apparently interpreted the word "tape" in the phrase "tape, stenographic or other verbatim recordings" to mean "audiotape." Thus, if the Manual indeed ordinarily allows taxpayers to make "audiotape, stenographic or other verbatim recordings of examination proceedings," the taxpayers' construction of the government regulation would appear to be plausible, reasonable, and proper, especially in the face of the expansive scope given to the Service's civil summons power. It is elementary that the meaning of a regulation must, in the first instance, be sought in the language in which it is framed, and if that is plain, and if the regulation is within the constitutional authority of the law-making body which created it, the sole function of the court is to enforce it according to its terms. *See generally, Central Trust Company v. Official Creditors' Committee of Ginger Enterprises, Inc.*, 454 U.S. 354, 102 S.Ct. 695, 70 L.Ed.2d 542 (1982), *quoting from and citing, Caminetti v. United States*, 242 U.S. 470, 485 (1917).

Taxpayers contend they have a right under Chapter 4245 to make a videotape record of the audit they have been compelled to appear at.

II

Even though Chapter 4245 provides that the recordings contemplated thereby "will ordinarily be allowed," except where the "taxpayer's or representative's behavior is clearly disruptive of the normal examination process or investigative proceeding," and even though the regulation further specifies that an examiner will "generally concur in" a request to make such recordings of examination proceedings, "subject to the following provisions," one of which is that "the recording takes place in a suitable location, ordinarily in Internal Revenue Service Offices," the Service, under the cases and under its own procedural regulation, was not legally justified either in the fact of its refusal or in the findings made to justify its refusal to allow taxpayers to make a verbatim mechanical recording of the audit

Neither did the Service or the district court make nor did the court of appeals point to any finding whatsoever that taxpayers', their representatives', or anyone else's behavior was or would be "clearly disruptive" of the normal examination process or investigative proceeding. Such a finding is required by section 4245. The only justification ever given taxpayers for the Service's refusal to allow the making of a verbatim video record of the audit was the agent's statement concerning the existence of a "GSA regulation" forbidding it. (R.36-37).

Thus, the taxpayers contend, the means by which the service refused to allow taxpayers to videotape the audit—a means condoned by the court of appeals—were in conflict with applicable decisions of this court. The Service and the approving court of appeals disregarded the provisions of the Service's own regulation, adopted for taxpayer's benefit, which regulation governs how the Service may allow or disallow taxpayer's request to make "tape, stenographic, or other verbatim recordings of examination proceedings."

An agency's action is invalid if the agency fails to comply with those rules promulgated to benefit a party by entitling the party to some procedural safeguard or substantive benefit. *United States ex rel Accardi v. Shaughnessey*, 347 U.S. 260, 74 S.Ct.

499, 98 L.Ed. 681 (1959); *Service v. Dulles*, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957); *Vitarelli v. Seaton*, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959); *see also*, *Yellin v. United States*, 374 U.S. 109, 83 S.Ct. 1828, 10 L.Ed.2d 778 (1963). An agency's rules, designed to provide "safeguards against essentially unfair procedures" (*see Bridges v. Wixon*, 326 U.S. 135, 152-153, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945)), must be complied with by the agency adopting them. It is a long line of cases, beginning with *Bridges v. Wixon*, supra, wherein this Court has held that "one under investigation . . . is legally entitled to insist upon the observance of rules promulgated by an executive or legislative body for his protection." *See also*, *U.S. ex rel Billokumsky v. Tod*, 263 U.S. 149, 155, 44 S.Ct. 54, 68 L.Ed. 221 (1923). While a federal agency may not be required by the Constitution to adopt a given regulation, it does not necessarily follow, as a matter of either logic or law, that the agency has no duty to obey it. "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, supra, 415 U.S. 199, 235, 94 S.Ct. 1055, 39 L.Ed.2d 720 (1974).

In addition to the failure to properly justify the Service's refusal in accordance with the procedural provisions of its own promulgated regulation, the very fact of the refusal, as supported by the court of appeals' opinion, is in conflict with applicable decisions of this Court. That refusal was unjust and unfair and, under *Mott* and Chapter 4245, incorrect. Even putting aside the fact that there was an ongoing criminal investigation, it is a simple fact that the § 7602 civil summons power as recognized by this Court, justifies the Service in compelling the manifestation of nontestimonial physical evidence. In recognition of this and in light of the additional fact that, as the Service contends, the 7602 examination usually constitutes "long silent hours of paper shuffling", it is apparent that the Service's refusal to allow videotaping of the audit proceeding contradicts the warning previouly announced in *Mott* that the Service may not exercise its broad summons power arbitrarily or unreasonably, or without proper regard for reasonable means elected by taxpayers or

witnesses to take notes of proceedings such as the proceeding here involved.

Furthermore, not only did the Service acquiesce in the correctness of *Mott* by promulgating Chapter 4245 which itself also allows taxpayers to elect to make stenographic recordings, the Service expanded on *Mott* by allowing taxpayers to make "tape [i.e. audiotape], stenographic or other verbatim recordings of examination proceedings." Nowhere does the Manual declare videotape recordation to be either prohibited or unreasonable. If, indeed, the question is one of "fairness", as the court of appeals indicates, a determination of fairness has indeed already been made by the Service in promulgating its regulation which allows taxpayers to make audiotape, stenographic or other verbatim recordings of examination proceedings. In sum, putting aside the question whether taxpayers actually do have a right to videotape an audit under Chapter 4245, the means by which the Service justified its refusal to allow videotaping violated taxpayers rights to those determinations that are required to be made under Chapter 4245.

III

The court of appeals' power to render the decision which is complained of before this Court depends on the existence of facts as to which there is no evidence whatever, and, consequently, the court of appeals' decision so far departs from the accepted and usual course of judicial proceedings and so far sanctions such a departure by the lower court as to call for an exercise of this Court's power of supervision

Taxpayers thus arrive at the crux of their contention as to why this Court rightly should review and reverse the court of appeals' ruling. As mentioned previously, no factual determination whatsoever was ever made, either by the Service or by the district court, regarding the "taxpayers' or their representative's behavior".

In addition, however, the court of appeals has grounded its opinion on supposed facts which actually are not facts of record—indeed, on facts contrary to what was emphatically

pointed out to be facts in the case. First, the court of appeals mistakenly states in its opinion that taxpayers were "offered" other means of recording the audit. No such offer was ever made. The simple fact that such other means were *available*, as indeed they were, would of course be an aid in establishing that there is no unfairness to taxpayers in a general sense. However, that is a policy decision within the province of the Service, not the court. The court of appeals asks the question whether there was any "unfairness to taxpayers." Insofar as the availability of "other means" of recordation is concerned, neither is such availability of any help in concluding that the refusal to allow the chosen means of videotaping recordation was not unfair, nor does it serve any useful purpose in determining whether videotape recording constitutes a reasonable means to make tape, stenographic or other verbatim recordings.

Furthermore, the court of appeals asserts that the "other means" that were offered were "fully adequate" to memorialize the proceedings. However, the stenographic record of the aborted examination, as presented to the district court and as set forth in the record before this Court, constituted in this case the basis for an erroneous assertion in the petition to enforce to the effect that taxpayer Annette S. Huene was *not present* and had *failed* and *refused to obey* the summons. This is at least indicative of one manner in which the "other means" which taxpayers supposedly were "offered" cannot be said to be "fully adequate" to memorialize the proceedings, at least as a general rule.

Moreover, the court of appeals erroneously asserts that taxpayers wish to videotape "each document." Such a statement is justified by nothing in the record in this case. Even the Service in its statement of the issue presented before the Court of Appeals acknowledged that this case deals with the right to make a "videotape record *of an examination* of their notes and records." Taxpayers desire to record the "examination proceedings" (Chapter 4245), not simply their "documents."

Such reliance on the existence of "facts" as to which there is no evidence whatever as a basis for the court of appeals' decision, constitutes a departure from the accepted and usual course of

judicial proceedings sufficient to call upon and exercise of this Court's power of supervision.

It is curious indeed how it can be anything other than an untoward departure from the accepted and usual course of judicial proceedings when the question appealed to the court of appeals is a purely legal one—i.e., whether under Chapter 4245 taxpayers have a right to videotape a compelled examination and whether the service is legally justified in its refusal to allow such video recordation—and when the court of appeals sets forth a rationale for decision which relies on three factual circumstances which are not facts of record in the case. Two pernicious results occur, both of which taxpayers seek review of in this Court. First, the court of appeals thereby creates and publishes an opinion which appears on initial cursory examination to be grounded on the facts in the case, immune from review by this Court, even if the facts are wholly erroneous. Second, and more fundamentally, the court of appeals violates its duty to answer the legal question put to it. *See Cohens v. Virginia*, 6 Wheat. (U.S.) 264, 404 (1821).

IV

The court of appeals' decision further departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Courts' power of supervision in that (1) although the appellate court's opinion asks whether taxpayers have a right to videotape the audit, the court's analysis addresses a wholly different question, and (2) the opinion misrepresents what taxpayers concede insofar as their constitutional arguments are concerned

The *per curiam* five paragraph opinion of the Court of Appeals for the Ninth Circuit fails to do justice either to the facts of the case, as discussed above, or to the law controlling the case. In short, the opinion is perfunctory; its statement of facts is incorrect both by misstatement and omission and by misleading implication; and its references to what taxpayers' contentions

are—and what taxpayers' concessions are—is erroneous. Moreover, its resulting rule of law is dangerously wrong and promises to lead to much mischief.

Were the court of appeals' decision to be the law of the land governing the questions presented by this case, it would most assuredly lead to confusion. First of all, the court's ruling rests on the amorphous concept of "fairness." The concept of fairness is meaningless both when it is *not* defined in terms of subjective facts and when it *is* defined in terms of subjective facts which are erroneous. Simply put, fairness is not an objectively determined concept once it departs from identity. The court of appeals has misconstrued and misrepresented the identity (i.e., the facts). It is respectfully submitted that Chapter 4245 does not envision that the question whether taxpayers have the right to make a videotape record of an audit should rest on some irreducible and nebulous concept of "fairness". The approach envisioned by Chapter 4245 contemplates objectively analyzable inquiries which have not been made in the present case.

Furthermore, the Ninth Circuit's opinion formulates a simplistic syllogism which cannot be followed by lower courts. The major premise of the reasoning is unstated, but necessarily implied from the relationship of the minor premise to the conclusion. The minor premise is: There has been no basic unfairness to taxpayers in the circumstances surrounding the Service's refusal to allow taxpayers to videotape the audit. ("There are no clouds in Omaha.") The conclusion is this: It therefore does not violate any right of taxpayers for the Service not to have permitted the use of video recorders. ("There is no rain in Tucson.") The missing but necessary major premise: If there is no basic unfairness to taxpayers in the availablility of "other means", there is no violation of any rights of taxpayers in not allowing them to videotape. ("If there are no clouds in Omaha, there is no rain in Tucson.") Thus, the court of appeals dismantles the issues presented by taxpayers, that of whether the means elected by taxpayers were both reasonable and allowable under *Mott* and Chapter 4245, whether taxpayers have a right to make a videotape verbatim record of the proceeding, and whether the Service made the necessary findings to justify its

refusal, and in their place the court erects a subjective test centered on the "fairness" of the availability of "other means" of recordation, a test that amounts to no more than asking the simple question: Is it fair?

In answering the question of "fairness", the court proffers three sentences, all of which deal with means *other* than videotaping: First, says the court of appeals, "[t]axpayers were offered other means of recording the audit which were fully adequate to memorialize the proceedings." This statement not only is untrue, but even if it were true, it does not serve to answer the proper question of whether the means actually elected by taxpayers were reasonable and allowable under *Mott* and Chapter 4245, let alone the question whether "under the circumstances" refusal to allow videotaping was proper. The court's further statement that such supposed "other means" were "fully adequate" to memorialize the proceedings may indeed be true; but that too does nothing to reveal whether videotaping is reasonable, whether refusal to allow it was either reasonable, "fair" or proper, or whether taxpayers have a right to employ such means. The court's analysis merely substitutes the court of appeals' judges' subjective concept of "fairness" and the perceived "adequacy" of unspecified "other means" for what is an otherwise vastly preferable objective test regarding the reasonableness of the means elected by taxpayers.

Furthermore, the court of appeals has rendered a decision based upon its own formulation of the issue as one of "fairness" "in the circumstances of this case." Such a foundation for a rule of law is vulnerable to arbitrariness. Are there circumstances in which it *would* be unfair to disallow videotaping? If so, what are they? The possible result ultimately of applying such a test may be that taxpayers will be unsure of their rights in the face of the Service's possibly arbitrary choices during the administration of audit procedures. The Service's choices may differ from time to time and from place to place either because of differing rules in different places, or because of different factual circumstances in other cases, or both. Given the recognized premise that a § 7602 examination is *not* endowed with safeguards to protect fairness to

taxpayers, this vague standard alone is a matter of sufficient importance to merit this Court's attention.

More importantly, the question of "fairness" has been turned on its head. *Mott* early on recognized what the court of appeals has not; namely, that the hearing contemplated by Section 7602 is *not* one attended by the safeguards inherent in court proceedings to insure fairness and impartiality protecting all parties to a controversy. Thus, the ***beginning premise*** of any discussion of fairness is that, simply put, the audit procedure is *not* inherently fair, and can only become so through taxpayers' employing safeguards of their own choosing, consistent with reason. *Mott* allows taxpayers to choose or "elect" such reasonable means as they have at their disposal to make their own record of the proceedings. Neither does the Service's Manual disallow or negate this nor does it diminish it. On the contrary, it expands on it. Indeed, *Mott* proclaimed that there is nothing in the entire statutory scheme of Title 28 to suggest that it was the intention of Congress to allow the Service to "disregard the reasonable means elected by taxpayers" to take notes of the examination. The Manual does not mention videotaping, and does not declare it to be unreasonable. Thus, if the issue is whether there is "basic unfairness to taxpayers," as the court of appeals suggests, then the court's reasoning itself should also *start* from the premise that indeed there *is* basic unfairness to taxpayers. The only remaining questions, under the law, should be whether the means elected by the taxpayers to make their record are "reasonable" and not forbidden.

Even if the conclusion reached by the court of appeals in the present case is the proper one, the rule of law announced to support that conclusion is dangerous. For example, if Chapter 4245 were to be rewritten to reflect the Ninth Circuit Rule of Law, it would read something as follows:

> Requests by taxpayers or their representatives to make audio tape, stenographic, or other verbatim recordings of examination proceedings will ordinarily be disallowed, if there are available other means of recording the audit which, as viewed by the Service or by a reviewing court,

> appear to be fully adequate to fully memorialize the proceedings, and if the documents taxpayers wish to videotape are their own records.

Even if such a rule were to be applied to what the actual facts of the present case are, the conclusion likely would be in favor of, not against, taxpayers. Taxpayers contend that neither is the conclusion arrived at herein correct, nor is the rule of law announced by the court of appeals just, workable, or reasonable. The rule ought to be corrected. But that is not all.

In addition, in promulgating its rule and announcing its decision, the court of appeals affirmatively misrepresents what taxpayers concede as far as their constitutional arguments are concerned. The court of appeals' opinion states that "taxpayers concede that they have no constitutional right to videotape the audit." This is not true. In its brief before the court of appeals, the Service cited a large number of opinions in *criminal* cases dealing with the asserted rights of *criminal defendants* and of *news broadcasting organizations* to either forbid, on the one hand, or permit, on the other hand, the electronic *broadcasting* over *television* of the subject criminal proceedings in violation of Rule 53 of the Federal Rules of *Criminal Procedure*, and local rules of court. Taxpayers concede that in their zeal to point out the inapplicability of these otherwise correct Supreme Court decisions and appellate court decisions, they argued forcefully and perhaps too forcefully that the constitutional rights asserted in those cases have no applicability in the present case. But they were correct in doing so.

For example, taxpayers do concede that the right to videotape the audit which they assert in this case does not exist by virtue of any First Amendment, Freedom of the Press right, as asserted by numerous news broadcasting and television organizations in their quest for an order permitting them to employ electronic audio visual equipment to televise in and broadcast from a federal courtroom certain criminal trial proceedings. The present case does *not* involve the press, criminal defendants, television broadcasting, federal courtrooms, trials, criminal laws, or the Federal Rules of Criminal Procedure or local rules of court.

Likewise, taxpayers do concede that their asserted right does not exist by virtue of a Fifth Amendment Due Process Right as was asserted by criminal defendants in certain cases cited by the Service regarding such defendants' desire to *prohibit* media coverage of criminal proceedings. Such cases as were cited by the Service to the court of appeals concerning such an asserted right of a criminal defendant deal with Federal Rule of Criminal Procedure 53 (which prohibits the taking of photographs in a courtroom during the progress of judicial proceedings, or radio broadcasting of judicial proceedings from the courtroom), with certain local rules of court (to the same effect), and with questions dealing with whether members of the press have the same right of access to observe criminal trials as do other members of the public (i.e., to merely attend). None of these considerations is relevant or even analogous in the present case.

Further, taxpayers do concede that their asserted right to videotape a civil §7602 audit does not exist by virtue of any Sixth Amendment guarantee of the right of an accused to a public trial, the right to which the Service, by way of straw-man argument before the court of appeals, urged that taxpayers do not have.

Taxpayers seek not to broadcast, televise, or otherwise disseminate information recorded at the examination; they seek merely to make an inexpensive, accurate and reliable *record* of the proceeding. They are not summoned to participate in a trial in a courtroom; the proceeding is not a criminal proceeding against them. It is an examination or investigation and is civil in nature. They are not third parties to the proceeding, as the press was at the trials in question in the cases cited by the Service. In contrast to those cases, no federal rule, statute, or administrative regulation forbids what taxpayers in the present case seek; indeed, a federal statute (as construed by a federal court, establishing a standard of "reasonableness") together with an Internal Revenue Manual provision seems, in fact, to exemplify and emulate what taxpayers seek.

The court of appeals, by its invitation to compare its decision with that reached in *United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir.) (no constitutional right to have criminal trial

televised), *cert. denied*, ____U.S.____ 103 S.Ct. 2094, 77 L.Ed.2d 303 (1983), betrays the appellate court's reliance on doctrines wholly inapplicable to the context of a Section 7602 examination, a reliance so fundamentally misplaced and erroneous as to justify the exercise of this Court's power of supervision. True, taxpayers did concede some constitutional arguments which they might have—but did not—assert. But they recognized that such arguments, which were introduced by the Service, were inapplicable and rejected the Service's attempt to present them to the court of appeals as if they were examples of constitutional arguments that had been rejected in prior similar cases. Those cases are far from similar.

In its ruling, the court of appeals asserted, without foundation in the record or in the arguments, that taxpayers had abandoned all constitutional challenges to the rejection of their chosen means of making a record of the compelled examination. Such a grievous error on the part of the appellate court ought not to be condoned or countenanced in light of its duty to decide questions presented to it.

Simply stated, taxpayers do contend they have a right to act as they judge best for their own interest, not inconsistent with the rights of others; to be free in the use of their powers, faculties and property, and to adopt and employ them in such lawful ways as they may choose, subject only to such restraints as are necessary to secure the common welfare of all the parties in this action. Taxpayers contend that they should be free from arbitrary and unreasonable restraint in the handling of their property (both their recording device and their records).

Taxpayers are quick to point out that they do not contend they have an absolute and unrestrained right, or unbridled license, to do as they please regarding the making of a record of the examination; they recognize that they exercise and enjoy this right subject to proper and legal regulation by the government, that their right must yield when outweighed by legitimate government interests or when freedoms of others are intruded upon.

But to say, whether "in the circumstances of this case" or per se, that taxpayers have no constitutional right to videotape an audit does not justify the conclusion that taxpayers are not entitled to have their request allowed or disallowed pursuant to the dictates of the law as embodied in Chapter 4245. Taxpayers are entitled to the findings required by that Manual provision. Due process requires this. Moreover, to say that taxpayers have no constitutional right to videotape an audit and to justify that conclusion by reference to doctrines announced in cases involving wholly inapplicable contexts does not properly serve to justify the conclusion that taxpayers have no right to videotape an administrative audit to which they have been compelled to appear.

In fact, if there is indeed any analogy to be drawn from the criminal law context, perhaps it would be well to remember that a § 7602 examination, its purpose being to obtain information to govern future action, is roughly analogous to a grand jury inquiry, where witnesses are compelled to appear and testify. Indeed, the very power granted under the statute authorizing administrative investigations bearing upon the matters required to be included in a federal tax return is inquisitorial in character and has been compared to the power vested in federal grand juries. An important difference, however, is that while the reports of grand juries are made to a court (a neutral third party), the results of tax investigations are reported to the Commissioner of Internal Revenue. *See e.g., Re Groban*, 352 U.S. 350, 77 S.Ct. 510, 1 L.Ed.2d 376 (1957); *Falsone v. United States*, 208 F.2d 734, *cert. denied*, 346 U.S. 864, 74 S.Ct. 103, 98 L.Ed. 375; *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950), *reh. den.* 340 U.S. 857, 71 S.Ct. 69, 95 L.Ed. 627 (1950). While, of course, there is no constitutional or statutory right to have a stenographer take or transcribe the testimony of witnesses before a federal grand jury, it has been recognized that an accused's request prior to indictment for recording of grand jury proceedings should be granted as a matter of course absent Government showing that it has a legitimate and compelling interest to be served by not recording such proceedings. *United States v. Thompson*, 493 F.2d 305 (9th Cir.) *cert. denied*, 419 U.S. 834, 95 S.Ct. 60, 42 L.Ed. 2d 60

(1974); *United States v. Heck*, 499 F.2d 778 (9th Cir.), *cert. denied*, 419 U.S. 1088, 95 S.Ct. 677, 42 L.Ed. 2d. 680 (1974). A federal rule does exist that provides that a stenographer may be present while the grand jury is in session. Such a rule, however, is permissive, not mandatory. *Heck*, supra. Such a rule might be reasonably analogized to Chapter 4245, which, of course, permits more than only a stenographer and which applies to a situation recognized as not being endowed with the traditional safeguards.

Thus, indeed, a § 7602 examination with which the present case is concerned is not adversary but ex parte in nature and its purpose is to discover and produce and to record the discovery and production of evidence. *See Haines v. Askew*, 368 F.Supp. 369 (D.C. Fla.), *aff'd* 417 U.S. 901, 94 S.Ct. 2596, 41 L.Ed 2d 208 (1947). The § 7602 investigative power is inquisitorial in nature. *Pacific Westbound Conference v. United States*, 332 F.2d. 49 (9th Cir. (1964)). Analagous to, but in contrast with, the existence and application of a federal statute governing the right of an accused to have a stenographer present during grand jury proceedings, taxpayers may not be ordered to appear and testify at a § 7602 civil examination except that the agency not only permit them to bring their own stenographer, if they have elected to do so *(Mott)*, but also permit them to make audiotape, stenographic or other verbatim records of the examination proceedings (Chapter 4245 as construed by the court of appeals), if they have requested and if their behavior is not clearly disruptive.

In summation, this court is not being asked to merely inquire into what may appear to be a unique, though possibly interesting set of facts; on the contrary, it is asked to review a matter where the public interest will be served by having the manifestly unjust decision below subjected to this Court's review. It seems that the inquiry made by the Judge of the district court below stated the issue best of all:

> What is the right of the Government to tell taxpayers what they may or may not do by way of perpetuating and memorializing the administrative audit . . . ? Is it restricted to the regulations or is there some secret rule floating

around there that a revenue agent can call upon at any time . . . ?

R.68. The rule announced by the Ninth Circuit is such a rule: It is subjective—a vague rule of "fairness" to be determined by an appellate court, not a sound rule of law—and it is dangerous and promises to encourage and promulgate uncertainty. It was arrived at by a course of judicial proceedings not at all within the accepted and usual course of judicial proceedings. The rule which taxpayers here seek review of is presented in a dangerously cursory form by way of *per curiam* opinion, which outwardly manifests not only miscomprehension and distortion of the record facts, but specious, spurious and erroneous and thus evasive analysis of the very questions presented.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: February 20, 1985

DONALD R. HUENE
Petitioner
In Propria Persona

ANNETTE S. HUENE
Petitioner
In Propria Persona

(Appendices follow)

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In the United States Court of Appeals
For the Ninth Circuit

NO. CA 83-2345

NO. DC 83-241

United States of America and
Marshall P. Jennings, Revenue Agent,
Petitioner-Appellees,

vs

Donald R. Huene and Annette S. Huene,
Respondents-Appellants.

OPINION

Appeai from the United States District Court
for the Eastern District of California
The Honorable E. D. Price, District Judge, Presiding
Argued and Submitted July 12, 1984

[Filed Oct. 23, 1984]

Before: Alarcon and Canby, Circuit Judges, and Stephens*, District Judge

Per Curiam:

Taxpayers were summoned by the Internai Revenue Service to appear for a tax audit, pursuant to 26 U.S.C. § 7602 (1982).

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*The Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

They agreed to appear, but only on condition that they be permitted to videotape the proceedings. The Revenue Agent refused to proceed on those terms, and the Service obtained an order from the district court requiring taxpayers to comply with the summons without videotaping the audit. Taxpayers appeal from that order.

Taxpayers concede that they have no constitutional right to videotape the audit. They rely entirely on *Mott v. MacMahon*, 214 F. Supp. 20, 22 (N.D. Cal. 1963), which allowed taxpayers to bring their own certified court reporter to an audit, while noting that the propriety of including or excluding such a reporter must depend upon a case by case consideration.

The difficulty with taxpayers' position is that the Service has accepted the ruling in *Mott*, and its manual provides that taxpayers may ordinarily make audiotape, stenographic or other verbatim recordings of audits. 1 Audit, CCH Internal Revenue Manual, Ch. 4245. It is undisputed that in this case the Service was willing to permit taxpayers to use such methods of recording. Taxpayers contend, however, that videotape offers certain advantages for the recording of documents and registering the appearance of persons. To that it may be countered that the Service and the district court could reasonably conclude that videotaping each document would unduly disrupt the proceedings. In any event, taxpayers' arguments miss the point. The question is not whether the Service might reasonably elect to permit the use of video recorders; it is whether it violates any right of taxpayers for the Service not to permit such use. We conclude that in the circumstances of this case it does not.

Taxpayers were offered other means of recording the audit which were fully adequate to memorialize the proceedings. The documents that they wish to videotape are their own records, which may be freely copied. Appearances can be noted in a transcript or tape recording; while mistakes can of course be made, they can also be made by omission in videotaping. Since there is no basic unfairness to taxpayers, their rights have not been violated. *Cf. United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir.) (no constitutional right to have criminal trial televised), *cert. denied*, 103 S.Ct. 2094.

In ordering taxpayers to appear for audit, the district court permitted them to be accompanied by "a certified shorthand reporter duly licensed pursuant to the provisions of the Business and Professions Code of the State of California." In our view, the requirement of certification is overly restrictive. The Service manual does not require that the taxpayers' reporter be certified, *supra* Ch. 4245, nor is the Service's own reporter required to be certified, *id.* at Ch. 9353(3). In the circumstances of this case, the requirement exceeds the district court's discretion. We therefore modify the order of the district court to delete the requirement of certification, and the order as modified and in all other respects is AFFIRMED.

APPENDIX B

MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

In The United States District Court For The
Eastern District Of California

CV F 83-241-EDP

United States Of America and
Marshall P. Jennings,
Revenue Agent,
Petitioners,

v.

Donald R. Huene and Annette S. Huene,
Respondents.

MEMORANDUM DECISION AND ORDER

[Filed Aug. 19, 1983]

On November 5, 1982, the plaintiff, Marshall Jennings, served Internal Revenue Service (hereinafter IRS) Administrative Summons upon the respondents.

Prior to the service of the summons, the District Director addressed a letter to respondent Donald R. Huene informing respondent that he had instructed the Fresno office to make a verbatim stenographic record of the examination process and that Dr. Huene could have a copy at his own request and at his own cost. He denied respondent's prior request to video tape the examination. The District Director pointed to no administrative or statutory authority for such position, but merely indicated that video taping would clearly be disruptive of the normal examination process. In the course of the letter, the District Director writes as follows:

> Tape recordings, stenographic or other verbatim recordings of examination proceedings will ordinarily be allowed except

where the recording is disruptive to the normal examination process.

He points to no specific reasons, in the instant case, as to why he felt the video recording would be disruptive of the examination process.

It is uncontested that on the appointed day, the respondents appeared with what they contended to be the subpoenaed records for examination. In addition, they were accompanied by an attorney,[1] and a person possessed of video recording equipment. Petitioner Jennings met the party at the door and refused to allow the audit to proceed. The dialogue between respondent Donald Huene and petitioner Jennings was preserved for posterity by a stenographic reporter of the Department of Treasury, one Mary Lee Morgan, CSR No. 2009. A transcript of the proceedings covers ten (10) pages wherein respondent Donald Huene reasserts his availability for a video taped examination, and petitioner Jennings persists in his refusal to proceed on that basis.

On June 7, 1983, the petitioners caused an order to show cause to issue to show cause why respondents should not be caused to obey the IRS summons. Respondents reply contending that the government is not entitled to an order of enforcement from the Court. In support of this position they argue:

1. Respondents complied with the provisions of the summons.

2. Agent Jennings was not authorized to issue a summons because of a pending criminal investigation.

3. Documents demanded by the summons are protected by respondents' 5th amendment right against self incrimination, and therefore not lawfully subject to voluntary disclosure.

4. The summons referred to in the petition was not issued in good faith nor for any valid purpose within the scope of § 7602 of the Internal Revenue Code of 1954, 26 U.S.C.

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[1] The government does not appear to have objection to counsel being present during these examinations.

5. The summons is vague, overly broad, and requests documents which are already in the possession of the United States and do not relate to the tax liability of respondents.

The Court discusses these issues in order.

I. The Defendants Have Complied With the Summons

It is not disputed that respondents appeared as ordered, with counsel and with a person bearing a video tape recorder. It is not disputed that petitioner Jennings refused to go forward with the audit on that basis.

The administrative process, as well as the judicial process, cannot proceed in an orderly fashion if the parties thereto, whether the administrative agency or the individual citizen, take the law into their own hands and dictate the basis upon which either will participate in the process.

In the instant case, both the Internal Revenue Service and Jennings, the managing case agent, had adequate notice of respondent's request to video tape the proceedings. Similarly, respondents had ample warning that video taping would not be allowed, and that a stenographic transcript of the proceedings would be made available. Further, in his uncontradicted declaration, respondent Donald Huene makes the following statement:

> Prior to receiving the summons for the aforementioned meeting with the Internal Revenue Service, I was informed that a criminal investigation of my tax returns was being undertaken. I informed Lowell T. Carruth, who along with Mr. Maglio, represented my position in a meeting with Agent Boehm and Agent Larsen on September 2, 1982. Mr. Carruth informed me after this meeting that the criminal investigation had been undertaken and was continuing.[2]

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[2] Respondent Huene is a frequent litigator with the IRS. In *Huene v. Internal Revenue Service*, CV F 83-044, respondent Huene filed a complaint for unlawful withholding of records after a demand therefor was served on the IRS. In defending against this suit, counsel for the IRS caused to be filed the following statement.

Despite the existence of these matters, neither party sought a protective order from the Court with reference to the administrative summons.

In *Mott v. McMahon*, 214 F.Supp. 20 (N.D.Cal.,S.D. 1963), Mott, a Special Agent of the IRS, sought to hold the respondent in contempt for failure to proceed with an examination upon a summons. McMahon had appeared and stated his willingness to participate in the examination provide that the proceedings would be taken down by a certified court reporter authorized to record judicial and judicially related proceedings pursuant to §§ 8000, et seq., of the California Business and Professions Code. There, as here, the Special Agent of the IRS refused to proceed under those circumstances. The District Court refused to hold the defendant in contempt and dismissed the petition, although petitioner attempted to withdraw the order to show cause before the decision. *Mott v. McMahon, supra*, has not been overruled nor was its holding challenged on appeal by the Internal Revenue Service. The Court would adopt its holding here as controlling.

The Court feels constrained however, to point out a distinction in *Mott* that is not here present. In that case, the taxpayer had employed a certified shorthand reporter licensed by the state and mandated by the state as well as by their own internal operating procedures, to properly preserve their notes for future reference and strictly controlling the dissemination of the transcripts. To the Court's knowledge, the State of California has not as yet seen fit to license or otherwise regulate the persons who record

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2. Plaintiff and his wife are presently under investigation by the Internal Revenue Service for the purpose of determining their correct Federal tax liability and determining whether plaintiff and his wife have committed any criminal violations of the internal revenue laws.

3. Release of the twenty-six pages of documents presently at issue in this litigation would impair Federal tax administration, would invade the privacy of third parties, would interfere with an ongoing law enforcement investigation, would reveal internal agency deliberations, would invade the attorney-client privilege, would undermine the attorney work-product doctrine, and would reveal law enforcement techniques.

judicial or judicially related procedures by video tape. Neither is there any professional organization that monitors the conduct of such operators nor to the Court's knowledge is there any requirement that a certification of the completeness of the video tape transaction be made. These are serious and important safeguards necessary to insure the integrity of the reporting process. Hence, the Court is not inclined to adapt the holding in *Mott, supra,* to video recording. Whether video recording is necessary to serve the particular purposes of the taxpayer may be decided on a case by case basis after considering the particular needs and requirements of the respective parties in regard to the pending summons.

II. Pending Criminal Investigation

Petitioner Jennings was called as a witness at the hearing on the order to show cause. Jennings testified under oath that he had been informed that the criminal investigation of the respondents covered years other than the year in question which was the subject of the summons. He further stated that he had been informed that the criminal investigation had been discontinued and abandoned.

As shown in footnote 2, in another case before this court and within a month of the date of this Memorandum Decision, another branch of the Internal Revenue Service was contending that a criminal investigation was still pending. There is no way that the Court can resolve this conflict, of course, inasmuch as it cannot delve into the prosecutorial activities of the IRS. Suffice it to say, the IRS representation to the Court is well documented and that if the IRS proceeds with the summons and it is later revealed that a criminal investigation was ongoing at the time of the summons, the Court can take appropriate action at that time.

III. Respondents' Fifth Amendment Defense

The respondents here, as is frequently the case, gives no more than lip service to their fifth amendment claim. The Court notes two matters in passing. The summons appears to be aimed at the Huene family trust and the Huene pension trust. The Court notes without deciding, that these trusts may have a quasi-

corporate identity and thus the taxpayer would not be entitled to claim a personal privilege. *See Mullens v. Anguilo*, 227 F.Supp 424 (D.C.Mass. 1964), *affd.* 338 F.2d 820, *cert. den.* 380 U.S. 863.

Secondly, the correct procedure to raise the fifth amendment defense is for the taxpayer to appear for the production with each document sought by the government, and as each document is produced, raise the fifth amendment claim or stand mute. Once this procedure is complied with, proper review of the claims of privilege can be had in the district court. *See United States v. Theep*, 502 F.2d 797, 798 (9th Cir. 1974).

IV. Good Faith Issuance of the Summons

Respondent has offered no countervailing testimony or other evidence to refute the testimony of petitioner Jennings that these documents are necessary to complete the audit of the tax liability of the respondents under examination.

V. Respondents' Claim of Vagueness, Overbreadth, and Documents Already in the Possession of the United States

Respondents make absolutely no showing under this defense, and the government implicitly denies that they have any such documents available to them.

ORDER

1. Respondents are ordered to appear at a time and place designated by petitioner and produce the documents described in the Department of Treasury, Internal Revenue Service Summons, Form No. 2039, issued on November 5, 1982.

2. Respondents may be accompanied by a certified shorthand reporter duly licensed pursuant to the provisions of the Business and Professions Code of the State of California, who may, at the sole cost and expense of the respondents, transcribe the oral proceedings at such examinations. If requested to do so, and upon the payment of appropriate fees, said certified shorthand reporter so selected by the respondents shall complete a transcript, file the original with the Court, and furnish one copy to

the petitioners and one copy to the respondents. All parties to these proceedings, as well as all officers, agents and employees of the Internal Revenue Service are ordered to maintain the contents of such transcripts as confidential, and said transcripts shall not be used for any purpose other than the further proceedings in this Court in this matter. Should any party desire to record such examination in any manner other than that determined by the Court, application therefor shall be made to the Court pursuant to the Federal Rules of Civil Procedure and the Rules of Local Practice for the Eastern District of California.

DATED: August 18, 1983.

/s/ EDWARD DEAN PRICE
Edward Dean Price
United States District Judge

APPENDIX C

JUDGMENT OR DECREE AND ORDER ON PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United States Court of Appeals
For the Ninth Circuit

No. CA 83-2345

United States of America and
Marshall P. Jennings, Revenue Agent,
Petitioners

vs

Donald R. Huene and Annette S. Huene,
Respondents.

ORDER

[Filed Jan. 22, 1985]

Before: Alarcon and Canby, Circuit Judges, and Stephens* District Judge.

The panel as constituted above has voted unanimously to deny the petition for rehearing.

The petition for rehearing is denied.

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*The Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

APPENDIX D

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

1. The Due Process Clause of the Fifth Amendment, United States Constitution, which provides: "No person shall . . . be deprived of . . . liberty or property without due process of law."

2. The statute under which taxpayers were compelled to appear at the Service's offices was Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.), which provides as follows:

§ 7602. Examination of books and witnesses

(a) Authority to summon, etc.—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense.—The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose

of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) No administrative summons when there is Justice Department referral.—

(1) Limitation of authority.—No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in effect.—For purposes of this subsection—

(A) In general.—A Justice Department referral is in effect with respect to any person if—

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination.—A Justice Department referral shall cease to be in effect with respect to a person when—

(i) the Attorney General notifies the Secretary, in writing, that—

(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) Taxable years, etc., treated separately.—For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

3. The Internal Revenue Manual provision which governs the determination whether taxpayers will be allowed to make tape, stenographic or other verbatim recordings of examination proceedings is 1 Audit, C.C.H. Internal Revenue Manual, Ch. 4245, which provides as follows:

4245.1 General

(1) Requests by taxpayers or their representatives to make tape, stenographic or other verbatim recordings of examination proceedings will ordinarily be allowed, except where the taxpayer's or representative's behavior is clearly disruptive of the normal examination process or investigative proceeding.

(2) In situations where a taxpayer or his/her representative requests to make tape, stenographic or other verbatim recordings of examination proceedings, the examiner will generally concur subject to the following provisions:

(a) group manager approval is secured prior to the recording;

(b) the taxpayer or representative furnish their own recording equipment;

(c) the Service can produce its own recording; and

(d) the recording takes place in a suitable location, ordinarily in Internal Revenue Service Offices.

4245.2 Procedure

(1) Should a taxpayer, or legal representative in advance of the examination proceeding, request permission to make a tape, stenographic or other verbatim recording, the matter should immediately be referred to the group manager for his/her approval. If approval is granted, the manager will arrange an appropriate time and suitable location in an Internal Revenue Office where equipment is available to make the Service's recording.

(2) In instances where a taxpayer, legal representative, or witness appears in an examination proceeding and requests to make a verbatim recording without the Service's prior knowledge of this intent, the group manager will attempt to make arrangements for space and recording equipment in order for the proceedings to continue immediately. If space and/or recording equipment are not immediately available, another appointment should be scheduled when such arrangements can be made.

(3) At the outset of the recording the examiner conducting an examination, conversation, or meeting which is to be recorded must identify himself/herself, the date, time, place, and purpose of the proceeding. Each participant in the proceeding also must identify themselves, their role in the proceeding, and acknowledge and consent to the making of a verbatim recording.

(4) If an additional participant arrives or a participant leaves the proceeding these facts should be noted on the recording.

(5) When written records are presented during the proceeding, they must be described in sufficient detail to make the verbatim recording a meaningful record when matched with the other documentation contained in the case file.

(6) At the conclusion of the proceeding, the examiner should state that the proceeding has been completed and the recording is ended.